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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 MATTHEW ROBERT BAGLEY,
9 Plaintiff,
10 v.
11 MICHAEL J. ASTRUE, Commissioner of
Social Security,
12 Defendant.

No. C-11-2149EMC

**ORDER GRANTING
MOTION TO REMAND
DENYING AS MOOT
MOTION TO STRIKE**

(Docket Nos. 16, 17)

**ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND; AND
DENYING AS MOOT DEFENDANT'S
MOTION TO STRIKE**

(Docket Nos. 16, 17)

In 2008, Plaintiff Matthew Bagley filed applications for disability insurance benefits under Title II of the Social Security Act and for Supplemental Security Income benefits under Title XVI of the Act, alleging that he became disabled on October 31, 2007. AR 113, 120. He has exhausted administrative remedies. This Court has jurisdiction for judicial review pursuant to 42 U.S.C. § 405(g). Currently pending before the Court are Mr. Bagley's motion to remand under § 405(g), Sentence Six, and Defendant's motion to strike. Docket Nos. 17, 16. Having considered the parties' briefs, as well as all other evidence of record, the Court hereby **GRANTS** Mr. Bagley's motion to remand and **DENIES** the motion to strike as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2008, Mr. Bagley filed for disability insurance benefits under Title II of the Social Security Act and for Supplemental Security Income benefits under Title XVI of the Act. AR 113. He alleged disability beginning October 31, 2007. AR 120. After the claim was denied initially and on reconsideration, Plaintiff requested a hearing which was held October 2, 2009. AR

1 61-65 (initial review), 71-75 (reconsideration), 32-56 (hearing). ALJ Terrill found Plaintiff not
2 disabled on November 3, 2009, and the Appeals Council denied review on March 25, 2011. AR 15-
3 23 (ALJ Terrill's decision), 1-5 (denying review). Plaintiff then filed the current action on May 2,
4 2011. Docket No. 1.

5 In the meantime, Plaintiff filed a new disability claim alleging disability beginning
6 December 30, 2009, less than two months after ALJ Terrill's unfavorable decision. Docket No. 10
7 at 4. On July 21, 2011, ALJ Benmour issued a fully favorable decision finding Plaintiff disabled as
8 of December 30, 2009. Docket No. 10, Ex. A. However, ALJ Benmour found that there was no
9 basis for reopening Plaintiff's prior applications before ALJ Terrill. *Id.* at 1.

10 Plaintiff now seeks to remand this action for reconsideration of ALJ Terrill's unfavorable
11 decision. Plaintiff argues that ALJ Benmour's subsequent favorable decision constitutes new and
12 material evidence warranting a remand for further administrative proceedings.

13 II. DISCUSSION

14 A. Motion to Strike

15 As a preliminary matter, Defendant filed a motion to strike a declaration and supporting
16 exhibits filed by Plaintiff's counsel on November 13, 2011. Docket No. 15. These documents are
17 portions of the record before ALJ Benmour in her subsequent decision, and are thus relevant to the
18 question of whether ALJ Benmour's decision is new and material evidence that might change ALJ
19 Terrill's prior decision. Defendant requested that the Court strike the declaration and documents
20 because they were not accompanied by any motion and because the declarant engaged in
21 impermissible legal argument. *See Mot. to Strike*, Docket No. 16, at 2. However, now that Plaintiff
22 has filed a motion to remand and both parties cite to the documents at Docket No. 15, the Court
23 finds that Defendant has in essence abandoned its motion to strike and that in any event, it is moot.¹
24 To the extent that Defendant still objects to Plaintiff's counsel's legal argument in his declaration,

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26 ¹ Indeed, if the Court were to strike the declaration and documents from the record, that
would merely provide additional justification for its decision to remand this matter because it would
27 be even less clear whether ALJ Benmour's decision was "easily reconcilable" with ALJ Terrill's
decision. *See Luna v. Astrue*, 623 F.3d 1032, 1035 (9th Cir. 2010) (remand is not warranted "in a
28 case where an initial denial and subsequent award were easily reconcilable on the record before the
court").

1 the Court does not consider such argument in this Order. Accordingly, the motion to strike is
2 **DENIED** as moot.

3 B. Motion to Remand Under Sentence Six

4 1. Legal Standard

5 Sentence Six of 42 U.S.C. § 405(g) provides, in relevant part, that “the court may . . . at any
6 time order additional evidence to be taken before the Commissioner of Social Security, but only
7 upon a showing that there is new evidence which is material and that there is good cause for the
8 failure to incorporate such evidence into the record in a prior proceeding.” *Akopyan v. Barnhart*,
9 296 F.3d 852, 854-55 (9th Cir. 2002) (“Sentence six remands may be ordered in only two situations:
10 where the Commissioner requests a remand before answering the complaint, or where new, material
11 evidence is adduced that was for good cause not presented before the agency.”) (citation omitted).
12 “New evidence is material if it ‘bear[s] directly and substantially on the matter in dispute,’ and if
13 there is a ‘reasonabl[e] possibility that the new evidence would have changed the outcome of the . . .
14 determination.’” *Bruton v. Massanari*, 268 F.3d 824, 827 (9th Cir. 2001) (quoting *Booz v. Sec'y of
15 Health & Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984) (internal quotation marks and citations
16 omitted) (emphasis omitted)). The Ninth Circuit has found that a subsequent ALJ’s decision is
17 material and warrants remand “where an initial denial and subsequent award [are not] easily
18 reconcilable on the record before the court.” *Luna v. Astrue*, 623 F.3d 1032, 1035 (9th Cir. 2010).
19 With respect to good cause, “[i]f new information surfaces after the Secretary’s final decision and
20 the claimant could not have obtained that evidence at the time of the administrative proceeding, the
21 good cause requirement is satisfied.” *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985) (citing
22 *Booz*, 734 F.2d at 1380).

23 In this case, Plaintiff requests remand under Sentence Six so that the ALJ can consider new
24 and material evidence; namely, ALJ Benmour’s favorable decision awarding Plaintiff benefits
25 beginning shortly after the date on which ALJ Terrill had denied Plaintiff said benefits. There is no
26 dispute that this evidence is new, as it post-dates ALJ Terrill’s decision. In addition, Defendant does
27 not contest Plaintiff’s arguments as to good cause, as Plaintiff contends that the evidence did not
28 exist at the time of ALJ Terrill’s decision and that he “could not have obtained” it sooner. Mot. at 5

1 (quoting *Key*, 754 F.2d at 1551). As Defendant makes no argument in its opposition regarding good
2 cause nor any claim of prejudice, the Court determines that good cause is satisfied here. *See Burton*
3 *v. Heckler*, 724 F.2d 1415, 1417-18 (9th Cir. 1984) (“The good cause requirement often is liberally
4 applied, where, as in the present case, there is no indication that a remand for consideration of new
5 evidence will result in prejudice to the Secretary.”). Accordingly, the only question is whether ALJ
6 Benmour’s decision is material to ALJ Terrill’s decision, such that there is a reasonable possibility it
7 could change the outcome.

8 2. Application

9 a. Preliminary Matters

10 As a preliminary matter, the Court rejects two arguments proffered by Plaintiff as
11 inapplicable to this matter. First, to the extent Plaintiff appears to seek review of ALJ Benmour’s
12 decision, rather than ALJ Terrill’s, the Court rejects such an invitation as ALJ Benmour’s decision
13 was issued in a separate matter and is not directly before this Court. Instead, ALJ Terrill’s decision
14 is before this Court. Therefore, the question before the Court is whether ALJ Benmour’s decision
15 constitutes new and material evidence that could affect the propriety of ALJ Terrill’s decision.

16 Second, Plaintiff appears to argue that ALJ Benmour constructively reopened ALJ Terrill’s
17 decision in granting Plaintiff’s second application for benefits, and that therefore remand of ALJ
18 Terrill’s decision is warranted. However, the constructive or de facto reopening doctrine does not
19 apply to cases with this procedural posture. Instead, this doctrine is an exception to res judicata; it
20 comes into play when a claimant does *not* appeal or seek judicial review of a first ALJ’s decision,
21 but *does* seek review of a second ALJ’s subsequent decision. In such a circumstance, a reviewing
22 court attempts to determine whether the ALJ whose decision is under review has considered the
23 merits of the *prior ALJ*’s decision, such that the reviewing court may examine the merits of that
24 prior ALJ’s decision along with its review of the second ALJ’s decision. *See Lewis v. Apfel*, 236
25 F.3d 503, 510 (9th Cir. 2001) (holding that court could consider evidence from before first ALJ’s
26 determination in review of second ALJ’s decision because “[r]es judicata does not apply when an
27 ALJ later considers ‘on the merits’ whether the claimant was disabled during an already-adjudicated
28 period”) (quoting *Lester v. Chater*, 81 F.3d 821, 827 & n.3 (9th Cir. 1995) (reviewing a second

1 ALJ's decision, and commenting that if the second ALJ "considers 'on the merits' the issue of the
2 claimant's disability during the already-adjudicated period," there is a "de facto reopening" and "the
3 Commissioner's decision as to the prior period is subject to judicial review"). Thus, whether a
4 second ALJ has de facto reopened a prior ALJ's decision may be relevant when a court is reviewing
5 the second ALJ's decision.

6 In this case, however, this Court is reviewing the *first ALJ*'s (ALJ Terrill's) decision; the
7 merits of ALJ Benmour's decision are not before this Court. Thus, it is undisputed that this Court
8 may review the first ALJ's decision, as it is currently under review in this matter. The relevant
9 question, then, is whether ALJ Benmour's decision constitutes new and material evidence that might
10 change ALJ Terrill's decision, warranting a remand in the instant case. While the materiality
11 question under Sentence Six may, as a practical matter, involve a similar factual inquiry as the de
12 facto reopening question (*e.g.*, whether ALJ Benmour's decision considered or touched on evidence
13 related to Plaintiff's disability during the time period at issue before ALJ Terrill), the Court need not
14 determine whether ALJ Benmour de facto reopened ALJ Terrill's decision because such a
15 determination would irrelevant where, as here, the Court's authority to review ALJ Terrill's decision
16 is already apparent. Thus, the Court need only determine whether ALJ Benmour's decision is
17 sufficiently relevant to the time period and allegations at issue in ALJ Terrill's decision to constitute
18 material evidence that might reasonably affect ALJ Terrill's decision. It is to this question that the
19 Court now turns.

20 b. Need for Remand

21 It is undisputed in this Circuit that a second ALJ's decision may constitute new and material
22 evidence warranting remand of the first ALJ's decision. In *Luna v. Astrue*, for example, the Ninth
23 Circuit found that remand was warranted where a second ALJ's favorable disability finding
24 "commenced at or near the time [plaintiff] was found not disabled based on the first application."
25 623 F.3d 1032, 1034 (9th Cir. 2010). The court endorsed "the proposition that, 'in certain
26 circumstances, an award based on an onset date coming in immediate proximity to an earlier denial
27 of benefits is worthy of further administrative scrutiny to determine whether the favorable event
28 should alter the initial, negative outcome on the claim.'" *Id.* at 1034-35 (quoting *Bradley v.*

1 *Barnhart*, 463 F. Supp. 2d 577, 580-81 (S.D. W. Va.2006) (emphasizing the “tight timeline” from
2 the denial of benefits to the grant of benefits)). In *Luna*, because the court could not “conclude
3 based on the record before [it] whether the decisions concerning Luna were reconcilable or
4 inconsistent,” and because “[t]here was only one day between the denial of Luna’s first application
5 and the disability onset date specified in the award for her successful second application,” the court
6 determined that remand for further factual proceedings was warranted. *Id.* at 1035; *see also id.* at
7 1034 (citing *Reichard v. Barnhart*, 285 F. Supp. 2d 728, 734 (S.D. W. Va. 2003) (“[I]n certain
8 circumstances, an award based on an onset date coming in immediate proximity to an earlier denial
9 of benefits is worthy of further administrative scrutiny to determine whether the favorable event
10 should alter the initial, negative outcome on the claim.”)).

11 However, the mere fact of a subsequent decision granting benefits is insufficient to warrant
12 remand. In *Bruton*, the Ninth Circuit upheld a district court’s order “denying [plaintiff’s] motion to
13 remand his benefits application in light of the later award of benefits based on his second
14 application” because the “second application involved different medical evidence, a different time
15 period, and a different age classification,” and therefore was “not inconsistent with the first ALJ’s
16 denial of Bruton’s initial application.” 268 F.3d at 827. The *Luna* court distinguished *Bruton* on the
17 basis that in *Bruton*, the “initial denial and subsequent award were *easily reconcilable* on the record
18 before the court.” *Luna*, 623 F.3d at 1035 (emphasis added) (citations omitted). Thus, where the
19 two decisions are close in time and either inconsistent or the reviewing court is unable to determine
20 whether they are inconsistent, remand is appropriate.

21 In this case, the two ALJ decisions are both close in time and not easily reconcilable based
22 on the record currently before the Court, thus creating a reasonable possibility that ALJ Benmour's
23 decision could change the outcome of ALJ Terrill's determination. *Bruton*, 268 F.3d at 827.
24 Accordingly, remand is warranted.

i. Overlapping Time Periods and Evidence

First, unlike in *Bruton*, here the two ALJ decisions rest on at least partially overlapping time periods and evidence, yet reach different conclusions. ALJ Benmour's decision finds Plaintiff disabled as of December 30, 2009, less than two months after ALJ Terrill issued his November 3,

1 2009 decision finding the opposite. *See* Docket No. 10, Ex. A, at 1 (ALJ Benmour's decision); AR
2 15-23 (ALJ Terrill's decision). While this proximity is not as severe as the one-day gap a district
3 court considered in *Hayes v. Astrue*, 488 F. Supp. 2d 560, 564 (W.D. Va. 2007), the two time
4 periods are nonetheless adjacent.

5 The two decisions also rely on the same claims of disability based on the same general set of
6 ailments. Namely, Plaintiff claimed disability in each case based on, *inter alia*, schizophrenia,
7 psychosis, mood disorders such as anxiety and depression, and learning disabilities. *Compare* AR
8 20 ("The claimant alleges he can no longer work due to his learning disabilities, psychosis, and
9 anxiety."), *and* AR 20-21 (noting reports of depression, memory problems, dysthymia, psychosis,
10 delusions, severely blunted affect, disorganization and marked functional limitations), *with* Docket
11 No. 10, Ex. A, at 3-5 (noting reports of, *e.g.*, schizophrenia, anxiety, flat affect, depression, memory
12 problems, and paranoia). There is no evidence that the severity of these disabilities materially
13 changed between the two periods. The record before ALJ Benmour indicates generally that
14 Plaintiff's symptoms have been longstanding and ongoing. *See, e.g.*, Docket No. 15-7 at 4
15 (February 2010 report noting Plaintiff indicates having had these symptoms "all his life"); Docket
16 No. 15-3 at 6 (report from mother describing him as "always" having been a "flat" person). On the
17 basis of the record currently before the Court, there was no acute event that might reasonably be
18 expected to precipitate such a change between the two adjacent time periods. *Cf. Galligan v. Astrue*,
19 656 F. Supp. 2d 1067, 1094 (D. Ariz. 2009) ("Dr. Levi's records beginning May 9, 2006 regarding
20 treatment *after Plaintiff's fall in April 2006* are not relevant to Plaintiff's condition as of the date of
21 the disability hearing [in November 2005].") (emphasis added).

22 Similarly, the evidence supporting Plaintiff's claims in each case overlap in both substance
23 and time. Such overlap weighs in favor of remand. *See Reichard*, 285 F. Supp. 2d at 734
24 (remanding based in part on the fact that "[a] review of ALJ Conover's second decision shows that
25 some of the evidence he considered was in the record before him on the first applications and/or
26 before the Appeals Council."). For example, Dr. Falls began treating Plaintiff (and saw him weekly
27 thereafter) on December 14, 2009, less than two weeks after ALJ Terrill's decision and long before
28 the Appeals Council ruled on Plaintiff's appeal of ALJ Terrill's decision. Docket No. 15-7 at 8. As

1 ALJ Benmour described, Dr. Falls's reports indicated that Plaintiff was per se disabled under the
 2 impairment listings. Docket No. 10, Ex. A, at 3. Although ALJ Terrill did not consider Dr. Falls's
 3 opinions, the Appeals Council considered two 2010 letters from Dr. Falls in its review of ALJ
 4 Terrill's decision and included them in the record in this matter. AR 1-4, 192-210.² Thus, were this
 5 Court to review the merits of ALJ Terrill's decision, Dr. Falls's reports accepted by the Appeals
 6 Council would have to be incorporated into this Court's substantial evidence review. *See Brewes v.*
 7 *Comm'r of Soc. Sec. Admin.*, ---F.3d ----, 2012 WL 2149465, *1 (9th Cir. June 14, 2012) ("We hold
 8 that when a claimant submits evidence for the first time to the Appeals Council, which considers that
 9 evidence in denying the review of the ALJ's decision, the new evidence is part of the administrative
 10 record, which the district court must consider in determining whether the Commissioner's decision
 11 is supported by substantial evidence.").

12 Additionally, the record before ALJ Benmour included reports from Dr. Kozart that were
 13 also part of ALJ Terrill's record, including notes from 2008 and a September 28, 2009 note
 14 indicating Plaintiff was schizophrenic and poorly compliant with medications, and that his condition
 15 was the same as a year prior. Docket No. 15-6 at 5. These notes pre-date ALJ Terrill's decision.
 16 The record further indicates that Dr. Kozart's reports played a role in *both* ALJ decisions, adding to
 17 the difficulty in reconciling the two contrary conclusions.

18 ii. Additional Evidence

19 The record also indicates that the record before ALJ Benmour contained additional material
 20 evidence that strengthens Mr. Bagley's claims before ALJ Terrill, thus creating a "reasonabl[e]
 21 possibility that the new evidence would have changed the outcome of" ALJ Terrill's determination.
 22 *Bruton*, 268 F.3d at 827. One of the key points in ALJ Terrill's decision was that he rejected Dr.

23 ² The Appeals Council stated that it considered Dr. Falls's September 3, 2010 letter and
 24 Medical Source Statement of Ability to do Work-Related Activities, and the Council "found that this
 25 information does not provide a basis for changing the [ALJ's] decision." AR 1-2, 5. The Council
 26 did not specify its reasons for that conclusion, so it is unclear based on the record whether the
 27 Council simply found the information insufficient or unpersuasive, or whether it found that the
 28 information was not pertinent given the evaluation time period. Because the record is unclear,
 remand is appropriate. *See Luna*, 623 F.3d at 1035; *see also Daniel v. Astrue*, CV 10-4825-JEM,
 2011 WL 3501759, at *6 (C.D. Cal. Aug. 9, 2011) (finding need for remand based in part on
 Appeals Council's failure to explain why subsequent evidence, including subsequent grant of
 benefits, did not warrant changing initial decision).

1 Kozart's treating physician opinion because of his limited treatment history and record. *See* AR 21.
2 However, ALJ Benmour had the benefit of additional treatment notes and records from Dr. Kozart,
3 which she found persuasive and consistent with the subsequent, more comprehensive treatment
4 records from Dr. Falls. *See* Docket No. 10, Ex. A, at 4. For example, ALJ Benmour's record
5 contained a November 9, 2009 progress note from Dr. Kozart, postdating ALJ Terrill's decision by
6 only six days. *Id.* at 3-4. Dr. Kozart's note indicated that Plaintiff had not been properly taking his
7 medications and was even more "flat" than the last time he had seen him. *Id.* at 3. Dr. Kozart
8 described him as "frustrated, flat, upset" and described him as having schizophrenia. *Id.* Follow-up
9 notes from November 19, 2009 indicate similar symptoms of schizophrenia, anxiety, and paranoia.
10 *Id.* at 4. Dr. Kozart's additional consistent treatment notes thus respond directly to ALJ Terrill's
11 criticisms in his order, and could change the weight he gives to this treating physician's opinion.
12 *See generally Lester*, 81 F.3d at 830 (providing that treating physicians' opinions are generally
13 accorded more weight and that ALJs must provide "specific and legitimate" reasons along with
14 "substantial evidence in the record" in order to disregard them in favor of non-treating opinions)
15 (internal citations omitted).

16 In addition, Dr. Falls's notes provide some potential explanation for Plaintiff's previously
17 spotty treatment history; he describes his symptoms in part as manifesting in a "lack of trust" of
18 mental health professionals, and that as a result he has had "minimal contact" with such
19 professionals in the past. *See* Docket No. 15-7, at 4. Dr. Falls also reaches similar conclusions to
20 Dr. Kozart regarding Plaintiff's mental impairments, though not always using the same terminology.
21 *Compare, e.g., id.* at 4-6 (Dr. Falls describing severe anxiety around people, depression, memory
22 problems, distrust of others, and isolation), *with, e.g.,* Docket No. 15-6 (Dr. Kozart describing
23 depression, alienation from people and difficulty talking to people, frustration, social anxiety, and
24 paranoia). His opinions therefore could bolster the persuasive value of Dr. Kozart's opinions before
25 ALJ Terrill. The more complete record before ALJ Benmour thus creates a "reasonable possibility"
26 that the subsequent grant of benefits was based on new evidence not considered by the ALJ as part
27 of the first application," which renders remand appropriate for further administrative consideration
28 of the earlier ALJ determination. *Luna*, 623 F.3d at 1035 (quoting *Booz*, 734 F.2d at 1380-81).

1 In short, the court is unable at this point to “easily reconcil[e]” the two decisions and the
2 records on which they were based. *Luna*, 623 F.3d at 1035. Instead, the record “indicates that
3 further consideration of the factual issues is appropriate to determine whether the outcome of the
4 first application should be different.” *Luna*, 623 F.3d at 1035 (quoting *Booz*, 734 F.2d at 1380-81).
5 Accordingly, Plaintiff’s motion to remand for further proceedings is **GRANTED**.

III. CONCLUSION

7 For the foregoing reasons, Plaintiff's motion to remand under Sentence Six is **GRANTED**,
8 and Defendant's motion to strike is **DENIED**. This action is hereby remanded to the Commissioner
9 of Social Security pursuant to Sentence Six of 42 U.S.C. § 405(g), to allow the Commissioner to
10 remand Plaintiff's claim to the Administrative Law Judge to hold a *de novo* hearing and issue a new
11 decision based upon a complete record.

12 “In a sentence six remand case, the Court retains jurisdiction following the remand.”
13 *Parquet v. Astrue*, C-96-01855 DLJ, 2011 WL 5030012, at *1 (N.D. Cal. Oct. 11, 2011) (citing
14 *Melkonyan v. Sullivan*, 501 U.S. 89 (1991)). “The statute provides that following a sentence six
15 remand, the Secretary must return to the district court to ‘file with the court any such additional or
16 modified findings of fact and decision, and a transcript of the additional record and testimony upon
17 which his action in modifying or affirming was based.’” *Melkonyan*, 501 U.S. at 98 (quoting 42
18 U.S.C. § 405(g)); *see also Carol v. Sullivan*, 802 F. Supp. 295, 300 (C.D. Cal.1992) (“A sentence six
19 remand judgment . . . is [] always interlocutory and never a ‘final’ judgment.”)). Accordingly, the
20 Commissioner is directed to return to this Court following completion of the administrative
21 proceedings on remand so that the Court may complete any necessary proceedings and enter a final
22 judgement or dismissal. *Davis v. Astrue*, 1:08-CV-00525 TAG, 2008 WL 4582498, at *1 (E.D. Cal.
23 Oct. 14, 2008). The parties are directed to file Joint Status Reports with this Court, commencing

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1 November 30, 2012, and continuing every ninety (90) days thereafter until further order of this
2 Court. A further CMC will be held on December 7, 2012.

3 This Order disposes of Docket Nos. 16 and 17.

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5 IT IS SO ORDERED.

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7 Dated: August 14, 2012

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EDWARD M. CHEN
United States District Judge

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